Supreme Court, U.S.
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No. 99-1700

IN THE

Supreme Court of the United States

CASE CORPORATION,

Petitioner,

v.

B & J COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JEFFERSON C. MCCONNAUGHEY
MICHAEL A. MCKENZIE
COZEN & O'CONNOR
Suntrust Plaza, Suite 2200
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 572-2000

ERIC G. HUGHES
Counsel of Record
TRAVIS R. BERRY
WRIGHT, CHANEY, BERRY,
DANIEL, HUGHES & MOORE
P.O. Drawer 947
Arkadelphia, Arkansas 71923
(870) 246-6796

Attorneys for Respondents

159499

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Between May 1995 and March 1996, certain employees of Case Corporation formed a "Cotton Picker Improvement Team" which conducted an "impartial review of cotton picker losses, including fires, to determine and implement appropriate corrective and preventative measures." The Team meetings were attended by a lawyer who wrote down the substance of the discussions at the meetings and sent his notes in letter form to Case's corporate counsel. The meetings had no relation to any pending or anticipated litigation. The letters from the outside counsel stated that "this group is to be involved in engineering questions rather than legal questions." The district judge made a factual finding — relied upon by the Circuit Court of Appeals — that the communications were not made for the purpose of securing legal advice nor were they made in anticipation of litigation or for trial. The question presented is:

Are factual reports prepared by a product improvement team member — who happens to be a lawyer — protected by the attorney-client privilege or the work-product doctrine?

CORPORATE DISCLOSURE STATEMENT

The majority of the Respondents listed in Appendix E of Petitioner's PETITION FOR WRIT OF CERTIORARI are individual farmers or private, family owned farming corporations or partnerships.

Some of the subrogated insurance carriers who are named respondents — Cotton States Mutual Insurance Company; Federated Mutual Insurance Company; Georgia Farm Bureau Mutual Insurance Company; Grange Mutual Insurance Company; Louisiana Farm Bureau Mutual Insurance Company; and Tennessee Farmers Mutual Insurance Company — are mutual companies owned by their policy holders.

Fireman's Insurance Company, of Newark, New Jersey and Glen Falls Insurance Company, are subsidiaries of CNA Insurance Company, Inc., a publicly traded company wholly owned by CNA Financial Corporation.

CGU Insurance Company, formerly Commercial Union Insurance Company, is a publicly traded company. It has no parent company and no publicly traded company owns 10% or more of its stock.

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The Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review the Eighth Circuit's unpublished *per curiam* opinion in this case.

STATUTORY PROVISIONS INVOLVED

United States Court of Appeals for the Eighth Circuit Rule 47B

Affirmance or Enforcement Without Opinion

A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision:

(1) a judgment of the district court is based on findings of fact that are not clearly erroneous;

(2) the evidence in support of a jury verdict is not insufficient;

(3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or

(4) no error of law appears.

The court in its discretion, with or without further explanation, may enter either of the following orders: "AFFIRMED. *See* 8th Cir. R. 47B"; or "ENFORCED. *See* 8th Cir. R. 47B."

STATEMENT OF THE CASE

Approximately 11% of the fleet of model 2055 and 2155 cotton pickers manufactured by Petitioner Case Corporation between 1992 and 1996 have been partially or totally destroyed by fire during or shortly after normal cotton harvesting operations. Eighty-five of the nearly 160 cotton picker fires have resulted in federal diversity litigation in nine states, the first cases having been filed in August of 1997. The jurisdiction of the various district courts where the cases were originally filed was based on 28 U.S.C. § 1332, the diversity jurisdiction statute. On May 11, 1998, the original seven cases were transferred "for coordinated or consolidated pretrial proceedings" to the United States District Court for the Eastern District of Arkansas by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. The consolidated cases were styled by the Panel as *In re Case IH Cotton Picker Fire Product Liability Litigation*, M.D.L. 1221, and were assigned to the Honorable G. Thomas Eisele, Senior United States District Judge. Since the original transfer order was entered, approximately seventy additional cases have been transferred and consolidated. The eighty-five fires in this litigation equate to approximately $11,500,000 in economic losses to the cotton farmers.

Early in this litigation, Respondents attempted to discover the identity of all of Petitioner's employees who conducted any investigation into the cotton picker fires. In addition, Respondents sought the production of all documents, memoranda, notes, investigation reports, minutes or other tangible things produced as a result of those investigations and which recorded any investigator's findings, observations, and conclusions. In response, Petitioner revealed the existence of a "Cotton Picker

Improvement Team" that conducted an investigation into "cotton picker losses, including fires." The Cotton Picker Improvement Team's investigations were conducted and the meetings were held between May 1995 and March 1996, long before this litigation commenced in August 1997.

Although agendas were prepared in advance of the Team meetings and minutes were kept of the discussions held during the meetings, none of those documents were in existence at the time they were requested by Respondents. In fact, there are virtually no documents prepared by Petitioner relating to any of its investigations into cotton picker fires. Despite the fact that Petitioner investigated over 100 cotton picker fires, only one investigation report was ever made by a Case employee, and that single report was made before the Petitioner formed the Cotton Picker Improvement Team.

Petitioner revealed to the district court and to Respondents that there were other documents in existence relating to the activities and investigations of the Cotton Picker Improvement Team. Those documents were in the form of letter-reports of a lawyer who was present at the meetings. However, Petitioner objected to producing the letter-reports that recorded the facts revealed by the Team's investigations. Petitioner claimed that the letter-reports were protected by the attorney-client privilege and the work-product doctrine. The district court conducted an *in camera* review of the documents and determined that they were neither privileged or work-product materials. The district court, therefore, ordered that the documents be produced (with minor redactions).

The district court based its order (filed under seal with this Court because the disputed documents are annexed to it) on three factual findings. First, the group was collectively known as the "Cotton Picker Improvement Team" and was made up of, among others, the product manager, the director of risk management, the chief engineer, and the product performance manager, as well as the outside counsel. Second, the first letter-report stated that "the project would involve an impartial review of cotton picker losses, including fires, to determine and implement appropriate corrective and preventative measures." Third, the letter-report of July 24, 1995, stated that "this group is to be involved in engineering questions rather than legal questions."

Petitioner filed a petition for a writ of mandamus with the United States Court of Appeals for the Eighth Circuit, pursuant to The All Writs Act, 28 U.S.C. § 1651, seeking an order prohibiting the district court from releasing the letter-reports. The Eighth Circuit issued its *per curiam* decision on December 7, 1999, holding that the district court "did not abuse its discretion in ordering production of the letters." App. A at 1a-3a. On January 24, 2000, the Eighth Circuit denied Petitioner's petition for rehearing and petition for rehearing *en banc*. App. B at 4a. Petitioner thereafter timely filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

The district court conducted an *in camera* review of the contested documents and made factual findings that the communications were not made for the purpose of securing legal advice nor made in anticipation of litigation or for trial. The United States Court of Appeals for the Eighth Circuit reviewed the district court's decision in light of the "useful guidelines" for deciding whether to issue a writ of mandamus, *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), and held in a *per curiam* order that the district judge did not abuse his discretion in ordering the production of the documents. App. A at 1a-3a. Petitioner is asking this Court to review an unpublished opinion by the Eighth Circuit having no precedential value for a supposed conflict with cases decided by the Third Circuit and the Arkansas Supreme Court. Besides being an insufficient basis for invoking this Court's certiorari jurisdiction, Petitioner's argument is incorrect: there is no conflict created by the Eighth Circuit's *per curiam* order.

I.

THE EIGHTH CIRCUIT'S RULING DOES NOT CONFLICT WITH THE ATTORNEY-CLIENT PRIVILEGE DECISIONS OF ANY OTHER RELEVANT COURT

A. There is no conflict with the Third Circuit case of *In re Ford Motor Co.*

Petitioner's argument that the Eighth Circuit's decision conflicts with other courts is without merit. The Eighth Circuit decided the case in an unpublished *per curiam* order under its Rule 47B. That rule is for cases where the court

"determines an opinion would have no precedential value." Thus, the Eighth Circuit's decision applies as only the law of this case and does not create a conflict with any other cases.

Nevertheless, even were the Eighth Circuit's decision to have precedential value, is not a true conflict with the Third Circuit decision relied upon by Petitioner. In contrast to the communications in this case that were made to "conduct an impartial review of cotton picker losses" and to answer "engineering questions," the case of *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), involved communications in a "meeting . . . called *to explain the technical aspects of the Bronco II litigation defense strategy*." *Id.* at 957 (3d Cir. 1997) (emphasis supplied). The communications in that case were made specifically for the purpose of securing legal advice; the communications in this case, the district court found as a fact, were not made for the purpose of securing legal advice, but to answer "engineering questions" about "corrective and preventative measures," as the documents themselves state.

B. There is no conflict with the Arkansas law of privilege.

Likewise, the Eighth Circuit's decision has not decided a question in a way that conflicts with a decision by a state court of last resort.[1] Such a conflict between a decision of a

1. The Petitioner makes its state law argument relying upon Rule 502 of the Arkansas Rules of Evidence, because Rule 501 of the Federal Rules of Evidence makes state law applicable. *See Baker v. General Motors*, F.3d (No. 99-1731, 99-2002, 8th Cir. April 14, 2000). However, this case involves communications by employees of a corporation with its principal place of business in Wisconsin; (Cont'd)

federal court sitting in diversity and a state court of last resort would not, by itself, be appropriate for certiorari review. *Cf. Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.").

In fact, there is no true conflict in this case. As a federal court sitting in diversity, the district court was obliged to apply state law. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938); *see also* Fed. R. Civ. P. 501 (making state privilege law applicable to those cases where "state law supplies the rule of decision"). But, there are no Arkansas cases that directly address the application of the attorney-client privilege to situations where a manufacturer conducts investigations of product losses in the normal course of business, along with the incidental participation of a lawyer unrelated to pending or anticipated litigation.

Arkansas privilege law is actually the same as that announced by the Eighth Circuit in *Diversified Ind., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), and later substantially adopted by this Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *See Corteau v. St. Paul Fire & Marine Ins.*, 307 Ark. 513, 821 S.W.2d 45 (Ark. 1991) (citing *Upjohn*). Although *Diversified* and *Upjohn* were decided "by the

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(Cont'd)
the communications took place in Illinois; and the individual cases are pending in nine different states. Setting aside the choice-of-law considerations and assuming that Arkansas law is the correct law to apply to each of these cases (a point admittedly not argued below), the documents are still not protected by the Arkansas law of attorney-client privilege.

principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," Fed. R. Civ. P. 501, those same considerations informed the decision of the Arkansas Supreme Court in *Corteau,* a case relying upon this Court's *Upjohn* decision. But unlike in *Corteau*, where the *lawyer requested statements* from health-care providers facing a potential medical malpractice claim, here the communications were made in the normal course of business efforts to make product improvements.

Rule 502(b) of the Arkansas Rules of Evidence protects only those communications "made for the purpose of facilitating the rendition of professional legal services to the client." The communication at issue in the case cited by Petitioner, *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (Ark. 1996), "was about *advice* to Mr. Byrd given to facilitate rendition of legal services to him" and involved "*case strategy* [and] the problem of communication" between the lawyer and the client. *Id.* (emphasis supplied); *see also McCrory v. Johnson*, 296 Ark. 231, 755 S.W.2d 566 (Ark. 1988) (attorney's *advice* not to take property was privileged as made for purpose of facilitating rendition of legal services). The communications at issue here do not involve "advice . . . given to facilitate rendition of legal services" or "case strategy," but rather, the communications were to answer "engineering questions" and to "determine and implement appropriate corrective and preventative measures."

C. The Eighth Circuit's decision is consistent with the well recognized law of attorney-client privilege.

Applying its factual findings to the principles of Arkansas privilege law, as it might be developed and extended by the "principles of the common law . . . in light of reason and experience," decisions by this Court and the Eighth Circuit provided other useful guidance to the courts below. *See Factors Etc., Inc. v. Pro Arts, Inc.* 652 F.2d 278 (2d Cir. 1981) (relying upon undecided state law principles announced by a Circuit Court of Appeals for the circuit in which the state was located). The well-settled law to be gleaned from those cases — some of which have been relied upon by the Arkansas Supreme Court — is that the attorney-client privilege does not shield communications made for a purpose other than securing legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney *made in order to obtain legal assistance* are privileged.") (emphasis supplied).

Although the attorney-client privilege is the oldest privilege for confidential communications known to the common law, and has the purpose of encouraging full and frank communication between attorneys and their clients, *Upjohn Co. v. United States*, 449 U.S. at 389 (1981), "since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures — necessary to obtain informed legal advice — which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. at 403 (1976).

Even though

> no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions [about the attorney-client privilege] with mathematical precision[,] . . . if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether the particular discussions will be protected.

Upjohn Co. v. United States, 449 U.S. at 393 (1981). Accordingly, some useful considerations are whether:

1. the communication was made for the purpose of securing legal advice;

2. the employee making the communication did so at the direction of his corporate superior;

3. the superior made the request so that the corporation could secure legal advice;

4. the subject matter of the communication is within the scope of the employee's corporate duties; and

5. the communication is not disseminated beyond those persons who, because of corporate structure, need to know its contents.

Id. at 394-95; *see also Diversified Ind., Inc. v. Meredith*, 572 F.2d at 609 (8th Cir. 1977).

With these considerations in mind, the district court conducted an *in camera* review of the letter-reports and held that

> nowhere is it stated or can it be inferred that the purpose of the meetings was to obtain advice from [the lawyer]. Rather, the communications made during the meetings were for the purpose of product improvement and likely would have been made in the absence of an attorney had litigation not been pending.

The "impartial review of cotton picker losses" presumably would be a review of *all losses*, which would necessarily "includ[e] fires." In other words, the investigations and discussions of the Cotton Picker Improvement Team related to cotton picker losses in general and were not communications with an attorney for the purpose of seeking legal advice about cotton picker fire losses. Indeed, the group was discussing "engineering questions" in an effort to "determine and implement appropriate corrective and preventative measures." As the district court noted, "[t]he Court imagines that product improvement meetings take place in the business community on a daily basis without the participation of an attorney. As was said in the letters, the purpose of the meetings was to determine and implement corrective and preventative action." District Court Order of June 23, 1999 (filed under seal).

D. There are practical reasons for denying the writ.

The district court was well aware that "the information discussed and disclosed at these meetings is very relevant to this multidistrict litigation. Because there is no other record of what occurred during these meetings, the Court believes

that Plaintiffs are entitled to these minutes." Not only is the information that was known, learned and gathered for the meetings by the Petitioner relevant, but the time the information came into the possession of the Petitioner is also relevant to the Respondents' claims of breach of warranty, negligence, failure to warn, strict products liability, and punitive damages. And, the deposition testimony of the Team members to date has revealed either a uniform failure of recollection regarding the facts of the meetings or a recollection that is in conflict with the information contained in the documents themselves.[2]

> By allowing a litigant to assert privilege to suppress contradictory evidence, . . . a litigant [has] free rein to make assertions contradicted by the litigant's own documentary evidence without being branded as untruthful. . . . [T]his is an abuse of evidentiary privilege because it permits a party to adhere to what appears to be an unequivocal position when contradictory evidence is available but inadmissible.

Baker v. General Motors, F.3d (No. 99-1731, 99-2002, 8th Cir. April 14, 2000) (dissenting opinion); *see also Fisher*

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2. It should be pointed out that the actual documents were attached to the district court's original order to produce the documents. The documents were later returned to the district court and placed under seal so as not to prejudice the Petitioner's ability to seek appellate relief. The contemporaneous documents are in conflict with the factual testimony of the meeting participants. *See Baker v. General Motors*, F.3d (No. 99-1731, 99-2002, 8th Cir. April 14, 2000) (dissenting opinion). These documents are the only contemporaneous record of the facts learned from the Team's investigations and communicated in the meetings.

v. United States, 425 U.S. at 403 (1976) (since the privilege withholds relevant information from the fact finder, it applies only where necessary to achieve its purpose).

Facts were gathered by members of the Cotton Picker Improvement Team outside the scheduled meetings and outside the presence or direction of the attorney who attended and recorded the discussions at those meetings. Those facts are not recorded in any form other than the reports of this attorney. Those recorded facts appear to squarely contradict subsequent factual testimony of members of the Cotton Picker Improvement Team. Petitioner does not, in truth, seek any application of existing privilege precedent to this matter, but instead seeks to expand the attorney-client privilege to provide a *per se* shield for facts contained in any document prepared by an attorney, regardless of whether such facts were gathered at that attorney's direction, gathered in the course of seeking or providing legal advice or gathered in the course of addressing pending or anticipated litigation. Such an extension of the privilege would have far-reaching and devastating effects upon discovery of relevant evidence from astute corporate litigants. Extension of the attorney-client privilege to encompass the type of documents at issue in this matter is unwarranted and unnecessary.

In summary, the Eighth Circuit reviewed the order of the district court and, in a *per curiam* order of its own, stated that "[h]aving carefully reviewed the documents in question, the parties' arguments, and the district court's thorough order, we conclude that the district court did not abuse its discretion in ordering production of the letters, *see In re Bieter Co.*, 16 F.3d 929, 932-33 (8th Cir. 1994), and deny Case's petition for writ of mandamus." App. A at 3a (other internal citation omitted). Not only does the Eighth Circuit's

decision fail to raise any compelling reason relating to the attorney-client privilege to invoke this Court's certiorari jurisdiction, it is also correct on the merits.

II.

THE DOCUMENTS ARE NOT PROTECTED BY THE WORK-PRODUCT DOCTRINE

For the same reasons discussed above relating to the district court's factual findings in connection with the attorney-client privilege, the documents are not protected by the work-product doctrine. Rule 26(b)(3) of the Federal Rules of Civil Procedure protects from disclosure "documents and tangible things . . . prepared in anticipation of litigation or for trial." The information that benefits from the qualified immunity of the work-product doctrine is nevertheless discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* As the district court noted,

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that *even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.*

District Court Order of June 23, 1999, *quoting Simon v. G. D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987) (emphasis supplied).

Having made the three particular fact findings discussed previously — (1) the group was named the "Cotton Picker Improvement Team" and made up mainly of engineers, with the incidental participation of a lawyer; (2) the group was to conduct an impartial review of cotton picker losses and determine and implement appropriate corrective and preventative measures; (3) and the group was to answer "engineering questions" — the district court went on to hold that:

> This information makes clear that the meetings were not held either in anticipation of or in preparation of litigation. Even though cotton picker litigation was pending at the time, and, even though the formation of the team was a result of the cotton picker fires, *the team's sole purpose was to determine and implement appropriate corrective and preventative measures*. After an accident, such as a cotton picker fire, it is to be expected that investigations will take place to prevent reoccurrence of the problem or to improve product safety. *See generally* Fed. R. Evid. 407 (subsequent remedial measures). The Court concludes that the meetings were held and the minutes prepared in the ordinary course of business for nonlitigation purposes and are therefore not entitled to protection as work product.

District Court Order of June 23, 1999 (filed under seal) (emphasis supplied).

Efforts by a product manufacturer to "determine and implement appropriate corrective and preventative measures" are not preparations made in anticipation of litigation or for trial. The district court's factual findings — relied upon by the Eighth Circuit — do not present any compelling reason to invoke this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JEFFERSON C. MCCONNAUGHEY
MICHAEL A. MCKENZIE
COZEN & O'CONNOR
Suntrust Plaza, Suite 2200
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 572-2000

ERIC G. HUGHES
Counsel of Record
TRAVIS R. BERRY
WRIGHT, CHANEY, BERRY,
DANIEL, HUGHES & MOORE
P.O. Drawer 947
Arkadelphia, Arkansas 71923
(870) 246-6796

Attorneys for Respondents